



Follow-up Policy Monitoring Review of Bosque County's Indigent Defense Systems

June 2022



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Chair:

Honorable Sharon Keller Presiding Judge, Court of Criminal Appeals

Ex Officio Members:

| | |
|-----------------------------|---|
| Honorable Nathan L. Hecht | Austin, Chief Justice, Supreme Court of Texas |
| Honorable John Whitmire | Houston, State Senator |
| Honorable Brandon Creighton | Conroe, State Senator |
| Honorable Nicole Collier | Fort Worth, State Representative |
| Honorable Reggie Smith | Sherman, State Representative |
| Honorable Sherry Radack | Houston, Chief Justice, First Court of Appeals |
| Honorable Vivian Torres | Rio Medina, Medina Statutory County Judge |
| Mr. Alex Bunin | Houston, Chief Public Defender, Harris County Public Defender Office |
| Honorable Valerie Covey | Georgetown, Williamson County Commissioner |
| Honorable Richard Evans | Bandera, Bandera County Judge |
| Honorable Missy Medary | Corpus Christi, Presiding Judge, 5th Administrative Judicial Region of Texas |
| Mr. Gonzalo Rios, Jr. | San Angelo, Attorney, Gonzalo P Rios Jr Law Office |

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| Debra Stewart | Fiscal Monitor |
| Doriana Torres | Grant Specialist |
| Sharon Whitfield | Budget & Accounting Analyst |

Mission: Protecting the right to counsel, improving public defense.

Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors local compliance with the Fair Defense Act through policy reviews.¹ In this follow-up review, TIDC observed court, interviewed officials, and reviewed FY2021 data from Bosque County. TIDC found that four of the previous report's findings remained pending:

- a. Lack of assistance with filling out requests for counsel and their untimely transmission to the courts.
- b. Untimely felony appointments.
- c. Untimely misdemeanor appointments.
- d. No processes in place to ensure misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel.

TIDC thanks Bosque County officials and staff for their assistance in completing this review. TIDC staff stand ready to provide technical and financial assistance to remedy these issues. TIDC will conduct a second follow-up review regarding its finding within two years.²

Background

TIDC issued an initial policy report on Bosque County's indigent defense practices in September 2017. The report made recommendations concerning the local procedures for requesting counsel at Article 15.17 hearings and the timeliness of appointments of counsel in misdemeanor and felony cases. TIDC also found that requests were not ruled upon, and there was not a process for waiving counsel before entering into pleas. Other County procedures complied with the core requirements of the Fair Defense Act.

Current Review

TIDC's policy monitoring rules require follow-up reviews where the report included noncompliance findings.³ Staff members Joel Lieurance and Olivia Lee conducted a follow-up review of Bosque County, with site visits on December 9 and 10, 2021 and on March 9, 2022. TIDC examined whether Bosque County successfully addressed the findings and recommendations from the September 2017 report. TIDC examined misdemeanor and felony case files to check for timeliness in appointments and met with the local justice of the peace who conducts 15.17 hearings. On March 9, 2022, TIDC observed a misdemeanor arraignment docket to observe the procedures for requesting counsel.

¹ TEX. GOV'T CODE § 79.037(a)–(b).

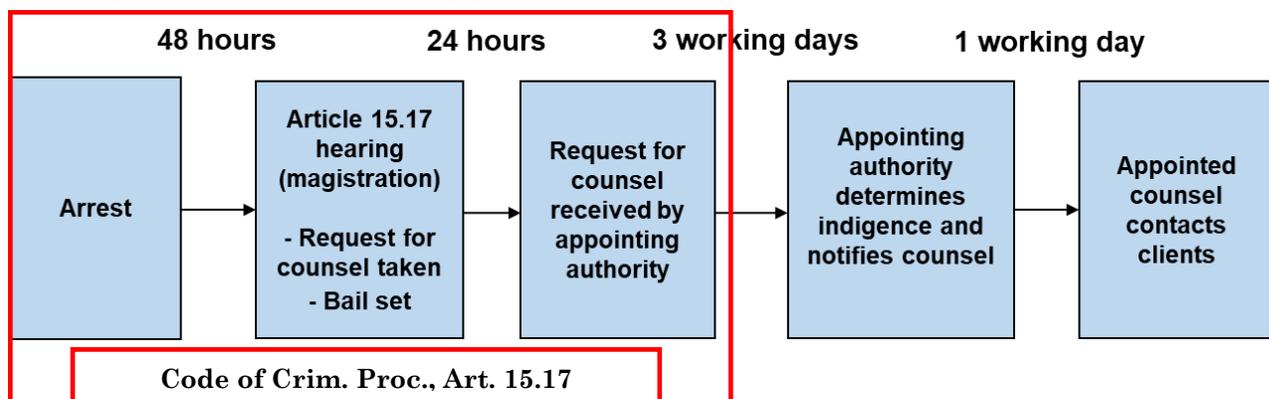
² 1 TEX. ADMIN. CODE § 174.28(c)(2).

³ 1 TEX. ADMIN. CODE § 174.28(d)(3).

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

Under Article 15.17 of the Code of Criminal Procedure, an arrested person must be brought before a magistrate within 48 hours.⁴ At this hearing, the magistrate must inform the person of the right to counsel, inform the person of the procedures for requesting counsel, and ensure the person has reasonable assistance in completing the necessary forms for requesting counsel.⁵ Magistrates must transmit requests for counsel to the appointing authority within 24 hours.⁶ If a person is arrested on an out-of-county warrant, the magistrate must perform the same duties as if the person were arrested on an in-county warrant.⁷

Figure 1a: Timeline for Appointment of Counsel in Adult Criminal Cases



Texas Judicial Council Monthly Court Activity Reports and the Ability of Arrestees to Request Counsel

Under Articles 15.17 (a) and (e) of the Code of Criminal Procedure, the magistrate must ask the arrestee whether he or she would like to request counsel and make a record of the request. Justices of the peace and municipal court judges are required to report the number of Article 15.17 hearings conducted and the number of requests for counsel from these hearings to the Office of Court Administration monthly. This data indicates that in FY2021, about 36% of misdemeanor arrestees and about 61% of felony arrestees request counsel at Article 15.17 hearings.

⁴ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁵ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁶ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁷ TEX. CODE CRIM. PROC. ART. 15.18(a). A list of contacts to send out-of-county requests is available at: <http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

Assistance with Counsel Requests and Their Transmission to the Courts

If an arrestee requests counsel, Article 15.17(a) requires that the magistrate ensure reasonable assistance in completing the paperwork necessary to request counsel. The request must then be transmitted to the appointing authority within 24 hours. Article 15.17(a) does not require the magistrate to assist with financial forms, but puts responsibility on the magistrate to ensure the assistance is provided. Case files show that several requests for counsel made at the Article 15.17 hearing either were not ruled upon or were ruled upon more than seven working days after the request was made.

Prior to this review, if a defendant requested counsel at the Article 15.17 hearing, the defendant would take the paperwork back to jail and turn it in to jail staff when the affidavit was complete. The jail would then send the request to the court via fax. In many instances, completed affidavits never reached the courts.

The Justice of the Peace in Precinct 1 handles most magistrate warnings. He confirmed gaps in current processes and agreed to ensure each defendant receives assistance in completing affidavits and to send affidavits electronically to the courts. During our March visit, the courts confirmed that they had begun to receive regular counsel requests from the jail and were able to promptly rule on those requests. TIDC believes these new procedures will address this finding and will verify its effectiveness on the next follow-up review.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

Conduct prompt and accurate magistration proceedings.

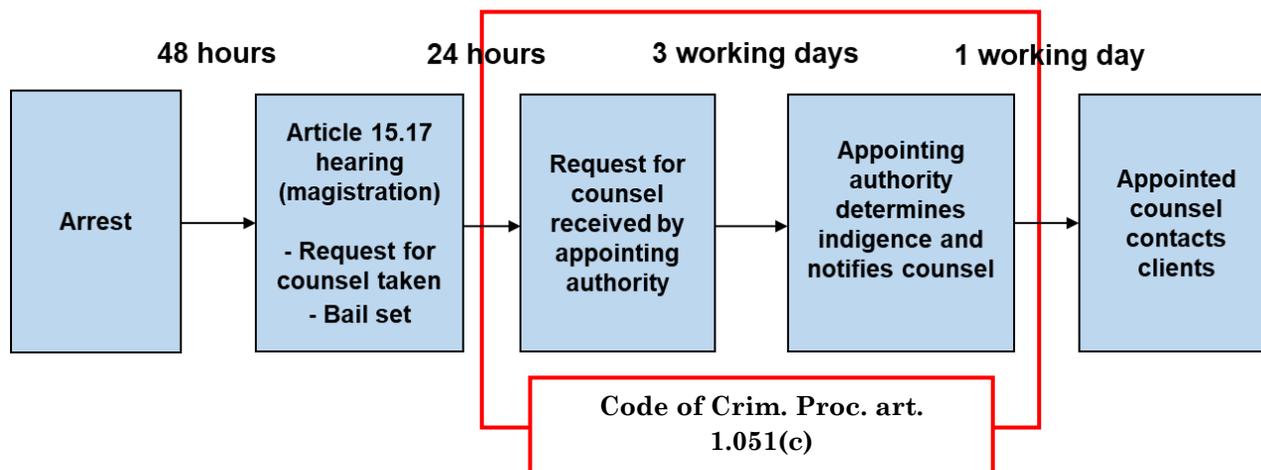
2017 FINDING and RECOMMENDATION 1: Article 15.17(a) requires that magistrates ensure reasonable assistance in completing forms necessary to obtain appointed. These forms must then be transmitted to the appointing authority within 24 hours. Bosque County magistrates must ensure arrestees receive this assistance and financial forms are promptly transmitted to the courts.

Issue Pending.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

Under Article 1.051(c) of the Code of Criminal Procedure, courts in counties with a population under 250,000 must rule on a request for counsel within three working days of receiving the request.

Figure 1b: Timeline for Appointment of Counsel in Adult Criminal Cases



The first opportunity for most defendants to request counsel is at the Article 15.17 hearing, when a defendant appears before a magistrate and is informed of the charges against him or her. If a defendant makes bail before the Article 15.17 hearing (or is never brought before a magistrate), the defendant has the first opportunity to request counsel at the initial appearance in the trial court.

To assess the timeliness of local appointment procedures, TIDC examines case files and measures the time from counsel request until appointment of counsel or denial of indigence. Under TIDC's monitoring rules, a county is presumed to be following the prompt appointment of counsel requirement if at least 90% of indigence determinations in the monitor's sample are timely.⁸

Timeliness of Appointments in Felony Cases

TIDC examined 34 felony cases filed between April and September 2021 to determine the timeliness of felony appointments. From this sample, TIDC found 31 requests for counsel. Counsel was appointed in a timely manner in 52% of cases with a request for counsel.⁹ This falls below TIDC's threshold for presuming a jurisdiction's

⁸ 1 TEX. ADMIN. CODE § 174.28.

⁹ Magistrate warning forms were not typically found in case files. To determine whether the defendant requested counsel at the Article 15.17 hearing, the monitor gathered forms from magistrates, and matched the magistrate warning forms with the case files examined. In some cases, the monitor found an appointment of counsel but did not obtain a magistrate warning form. In these instances, the monitor considered the time of the request to be the earlier of the date marked on the affidavit of indigence or the date of the appointment.

procedures ensure timely appointment of counsel. Nine of these requests either did not receive a ruling or received a ruling more than seven workdays after the request. This is an indication that the courts are not timely receiving requests for counsel. Recent changes in procedures for sending requests to the courts should address this issue.

Table 1: Times from Request to Appointment in Felony Cases

| | Number from Sample | Percent of Sample |
|--|--------------------|-------------------|
| Total records examined | 34 | |
| Requests for counsel | 31 | |
| Request for counsel ruled upon in 'x' workdays | | |
| 0 workdays | 5 | |
| 1 to 3 workdays + 24 hours allowed to transmit a request | 11 | |
| Timely Rulings on Requests | 16 | 52% |
| Between 4 and 7 workdays | 6 | |
| More than 7 workdays | 8 | |
| No ruling on request | 1 | |
| Untimely / No Rulings on Requests | 15 | 48% |

Timeliness of Appointments in Misdemeanor Cases

To assess the timeliness of Bosque County’s current appointment procedures in misdemeanor cases, TIDC examined 61 misdemeanor cases filed between April and September 2021. From this sample, the monitor found 27 requests for counsel. Counsel was appointed in a timely manner in approximately 41% of cases with a request for counsel. This falls below TIDC’s threshold for presuming a jurisdiction’s procedures ensure timely appointment of counsel. Sixteen requests either did not receive a ruling or received a ruling more than seven workdays after the request. This is an indication that the court is not timely receiving requests for counsel. Recent changes in procedures for sending requests to the courts should address this issue.

Table 2: Times to Appointment in Misdemeanor Cases

| | Number from Sample | Percent of Sample |
|--|--------------------|-------------------|
| Total records examined | 61 | |
| Requests for counsel ¹⁶ | 27 | |
| Request for counsel ruled upon in 'x' workdays | | |
| 0 workdays | 9 | |
| 1 to 3 workdays + 24 hours allowed to transmit a request | 2 | |
| Timely Rulings on Requests | 11 | 41% |
| Between 4 and 7 workdays | 1 | |
| More than 7 workdays | 11 | |
| No ruling on request | 4 | |
| Untimely / No Rulings on Requests | 16 | 59% |

Waivers of Counsel in Misdemeanor Cases

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers that are voluntarily and intelligently made. Under Article 1.051(f-1), the prosecutor may not initiate a waiver and may not communicate with a defendant until any pending request for counsel is denied, and the defendant waives the opportunity to retain private counsel. Under Article 1.051(f-2), the court must explain the procedures for requesting counsel to an unrepresented defendant and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state. If a defendant enters an uncounseled plea, then he or she must sign a written waiver, the language of which must substantially conform to the language of Article 1.051(g).

TIDC's case file examination contained four samples in which the court did not rule on requests for counsel. In one sample case, a misdemeanor defendant requested counsel at the Article 15.17 hearing and later entered an uncounseled plea without the request being ruled upon. The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Bosque County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

In the initial monitoring review, TIDC found that the waiver of counsel form did not match the provisions of 1.051(g). That form only waived the following two terms: "that I have the right to an attorney and as an indigent to appointed counsel" and "waive my right to remain silent and an attorney." The waiver of counsel form now tracks the language of 1.05(g) by including the following provisions:

1. *I understand that I am charged with the misdemeanor offense of _____ in the County Court at Law of Bosque County, Texas;*
2. *I further understand that I am entitled and have a right to be represented by an attorney;*
3. *I further understand that if the court finds me to be indigent (too poor to hire an attorney), the court will appoint me an attorney;*
4. *The court has explained to me the dangers and disadvantages of representing myself;*
5. *I understand I may withdraw this waiver at any time during the proceeding but, if I do so, I do not have the right to a hearing on any other matter which has been heard by the court before withdrawal of this waiver;*
6. *I understand that I have the right to have these proceedings recorded by the court reporter.*

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

Appoint Counsel Promptly.

2017 FINDING and RECOMMENDATION 2 (felony cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in felony cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

Issue Pending.

2017 FINDING and RECOMMENDATION 3 (misdemeanor cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working day (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases. ***Issue Pending.***

2017 FINDING and RECOMMENDATION 4 (misdemeanor cases): The County does not have processes in place to ensure misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel. As required by Article 1.051(f-2), the court must rule upon requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor. ***Issue Pending.***

2017 FINDING and RECOMMENDATION 5 (misdemeanor cases): If a defendant wishes to enter an uncounseled plea, the defendant must sign a waiver of counsel which substantially conforms to Article 1.051(g). ***Successfully Addressed.***

Conclusion

TIDC thanks Bosque County officials and staff for their assistance in completing this review. TIDC will conduct a follow-up review regarding its noncompliance findings within two years.¹⁰ TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

Findings and Recommendations from the June 2022 Review

The County must provide a written response to each of the report's findings within 60 days after the report is received by the County. TIDC stands ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

Core Requirement 1. Conduct prompt and accurate Article 15.17 proceedings.

2022 FINDING and RECOMMENDATION 1: Article 15.17(a) requires that magistrates ensure reasonable assistance in completing forms necessary to obtain appointed. These forms must then be transmitted to the appointing authority within 24 hours. Bosque County magistrates must ensure arrestees receive this assistance and financial forms are promptly transmitted to the courts. *Issue Pending.*

Core Requirement 4. Appoint counsel promptly.

2022 FINDING and RECOMMENDATION 2 (felony cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in felony cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases. *Issue Pending.*

2022 FINDING and RECOMMENDATION 3 (misdemeanor cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working day (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor's sample of attorney appointments in misdemeanor cases fell below the Commission's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases. *Issue Pending.*

¹⁰ 1 TEX. ADMIN. CODE § 174.28(c)(2).

2022 FINDING and RECOMMENDATION 4 (misdemeanor cases): The County does not have processes in place to ensure misdemeanor requests for counsel are ruled upon prior to a defendant's waiver of counsel. As required by Article 1.051(f-2), the court must rule upon requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor. *Issue Pending.*